Provisional

For participants only

4 June 2018
Original: English

International Law Commission

Seventieth session (first part)

Provisional summary record of the 3390th meeting
Held at Headquarters, New York, on Monday, 30 April 2018, at 3 p.m.

Contents

Opening of the session

Election of officers

Introductory remarks of the Chair

Adoption of the agenda

Organization of the work of the session

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Programme, procedures and working methods of the Commission and its documentation

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent as soon as possible to the Chief of the Documents Management Section (dms@un.org).

Corrected records will be reissued electronically on the Official Document System of the United Nations (http://documents.un.org/).

18-06871 (E)

Please recycle

Present:

Temporary Chair:	Mr. Nolte
Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Opening of the session

The Temporary Chair declared open the seventieth session of the International Law Commission.

Election of officers

Mr. Valencia-Ospina was elected Chair by acclamation.

Mr. Valencia-Ospina took the Chair.

Mr. Šturma was elected First Vice-Chair by acclamation.

Mr. Nguyen was elected Second Vice-Chair by acclamation.

Mr. Jalloh was elected Chair of the Drafting Committee by acclamation.

Ms. Galvão Teles was elected Rapporteur by acclamation.

Introductory remarks of the Chair

The Chair, after thanking the members for the trust they had placed in him, said that it was a privilege to chair the Commission and that he would make every effort to deserve that trust and to make the current session successful and productive. The strength of the Commission derived from its members' intellectual rigour and capacity, their technical knowledge and vision, their respect for each other's views, their ability to dialogue and their discipline, hard work and collegiality. The Commission was also fortunate to be supported by an extremely knowledgeable and competent secretariat.

The Commission was embarking on a historic session which would feature celebratory events to mark its seventieth anniversary. During the session, the Commission would complete its study on subsequent agreements and subsequent practice in relation to the interpretation of treaties and on identification of customary international law. It would also aim to adopt in first reading two sets of draft guidelines on protection of the atmosphere and provisional application of treaties, respectively, and continue its consideration of four other topics.

As a member from Latin America, he wished to highlight the contribution of jurists from that region to the codification of international law. He was proud to be the second national of Colombia to have been elected as a member of the Commission, following in the footsteps of Mr. Jesús María Yepes, who had been a member of the Commission from 1949 to 1953. His election as Chair of the Commission was the culmination of a legal career in the service of the United Nations spanning more than 50 years. He would do his utmost to ensure that all members participated in the Commission's work and that the current session had a successful outcome.

Adoption of the agenda (A/CN.4/709/Rev.1)

The provisional agenda was adopted.

Organization of the work of the session (agenda item 1)

The Chair invited the Bureau and the Special Rapporteurs to join him to discuss the programme of work and a number of organizational matters.

The meeting was suspended at 3.45 p.m. and resumed at 4.40 p.m.

The Chair drew attention to the proposed programme of work for the first six weeks of the Commission's current session, which would begin with the consideration of the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". The Commission would hold an election at its 3391st meeting to fill the casual vacancy which had arisen following the resignation of Mr. Kolodkin on 4 April 2018. It would also hold a plenary meeting to hear a briefing by Mr. Nolte and by the Secretary on the programme and preparations for the seventieth anniversary commemoration events. Mr. Nolte would provide the briefing in his capacity as the Chair of the advisory group tasked at the sixty-ninth session with working with the Secretariat to plan the commemorative events.

The Drafting Committee on the topic "Peremptory norms of general international law (*jus cogens*)" would meet to conclude the work left over from the sixty-ninth session.

The Special Rapporteur for the topic "Protection of the environment in relation to armed conflicts" had requested that the Commission should establish an open-ended Working Group to consider the draft commentaries on the draft set of principles adopted under that topic at the sixty-eighth session by the Drafting Committee and taken note of by the Commission.

It was his understanding that Mr. Vázquez-Bermúdez would be available to chair the Working Group and that the Bureau had endorsed that proposal. He took it that the Commission agreed to establish the proposed open-ended Working Group chaired by Mr. Vázquez-Bermúdez.

It was so decided.

The Bureau had endorsed a suggestion that the Commission, in principle, should meet on Monday mornings and Friday afternoons for three weeks, which was different from the usual practice, and was motivated by the fact that the Commission had an unusually heavy workload during the first part of the session, linked in particular to the conclusion of two topics on second reading, and possibly a further two topics on first reading. It was therefore important for the Commission at the current session to consider new topics for inclusion not only in its long-term programme, but also in its current programme of work.

He took it that the Commission agreed with the proposed programme of work for the first six weeks of the session.

It was so decided.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (A/CN.4/712 and A/CN.4/715)

Mr. Nolte (Special Rapporteur), introducing his fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/715), noted that the topic had been on the Commission's agenda since 2013; if the Commission could conclude its work thereon by the end of 2018, it would have completed its task within the comparatively short time of six years. It was true that, between 2009 and 2012, the Commission had dealt with many of its aspects within the framework of a Study Group on Treaties over time. The Study Group format for the topic showed that the Commission did not always immediately accept proposals for new topics, but sometimes tested the viability of proposals through different formats.

It followed that, in a sense, most of the draft conclusions adopted on first reading in 2016 had been considered twice by the Commission, first within the framework of the Study Group, and then again, between 2013 and 2016, in the usual format of the Commission's work, namely through its debates on the Special Rapporteur's reports, the elaboration of draft conclusions in the Drafting Committee and their adoption by the plenary, together with commentaries. States had always had the benefit of the Commission's commentaries when reacting in the Sixth Committee of the General Assembly to the work on the topic. In the Sixth Committee's four debates thereon, in 2013, 2014, 2015 and 2016, between 25 and 35 States had regularly offered comments on the submitted draft conclusions and commentaries. For that reason, the comments and observations by States addressed in the fifth report were mostly statements from the Sixth Committee's debates from 2013 to 2016; while they had been summarily reported in the Special Rapporteur's report of the year following their submission, they had not been able to be immediately fed back into the work on the topic, since the Commission had by then moved on to the next draft conclusions. Only in the fifth report therefore were those comments and observations described and evaluated in detail.

The fifth report also took into account statements by States received by the Commission after the Sixth Committee's debates in 2016 and which dealt with the set of draft conclusions as a whole. There appeared to be two reasons why such statements had been submitted by only 13 States. First, almost all the draft conclusions, with perhaps one exception, had received broad-based support among States, whose comments concerned mostly nuances or details in the commentaries and did not call into question the substance or formulation of the draft conclusions themselves. Where, exceptionally, a State had expressed substantive criticism, such criticism had not usually been shared by other States, or was shared by only a very limited number of States. Secondly, States saw no reason to repeat the comments they had made between 2013 and 2016, given that the text of the draft conclusions had not changed on first reading. Members should keep that background in mind as a superficial reading of the fifth report could give a misleading impression. The report considered practically all comments by States that reflected individual expressions of nuance or disagreement, which should not, however, distract from the basic consensus underpinning the draft conclusions and their commentaries. He hoped that the Commission would therefore be able to fine-tune and conclude its work on second reading. He had felt encouraged by the reactions of States to maintain most of the draft conclusions with only a few changes; for convenience, they were reproduced, together with his proposed changes, in the annex to the report.

He recommended that draft conclusion 1 [1a] (Introduction) should be maintained unchanged, as it had attracted few observations, none of them being seriously critical. Draft conclusion 2 [1] (General rule and means of treaty interpretation) had been generally supported by States. The only question with respect to which States had expressed different views had been whether the draft conclusion, or the commentary, should refer to the "nature of the treaty" as a relevant factor for determining whether more or less weight should be given to certain means of interpretation. After a long debate, the Commission had decided, against the view of the Special

Rapporteur, not to refer to the "nature of the treaty" in the text of the draft conclusion. Since, moreover, the views of States on the question were more or less evenly divided, it seemed preferable to maintain the reference to the question in the commentary. He therefore recommended that draft conclusion 2 should remain unchanged, except to replace the words "en el sentido" with the words "en virtud del" in the Spanish version.

With regard to draft conclusion 3 [2] (Subsequent agreements and subsequent practice as authentic means of interpretation), which had been generally approved in substance, as the two proposed terminological changes would cause the text to depart from the Commission's established terminology, he recommended that it should be maintained as adopted on first reading. Draft conclusion 4 (Definition of subsequent agreement and subsequent practice) had likewise been generally supported by States. Some specific comments and observations regarding paragraph 1 were aimed at adding substantive elements that were not necessary in a draft conclusion on definitions or were articulated elsewhere in the draft instrument or concerned the commentary. Two States had proposed changing the text to make it clear that "practice" could not consist of a single event; he did not consider that necessary or appropriate. He did, however, agree with the proposal to move the inverted commas around the term "subsequent practice", to indicate more clearly that the term to be defined was "other subsequent practice". No further changes were recommended.

Turning to draft conclusion 5 (Attribution of subsequent practice), he said that substantive considerations militated in favour of changing its formulation, which could currently be misconstrued to mean that conduct attributable to a State under the rules of State responsibility was thereby also automatically relevant for the interpretation of treaties. As had been pointed out correctly by the United States, however, there were certain acts, for example the actions of a State agent taken contrary to instructions, that were attributable to a State for the purposes of State responsibility but were not considered State practice for the purposes of the interpretation of treaties. He therefore recommended that the words "in the application of the treaty" in paragraph 1 should be moved to the end of the sentence, to make it clear that attribution under the rules of State responsibility was a necessary but not a sufficient condition, and that conduct could thus only be relevant for the interpretation of a treaty if undertaken in a recognized application of the treaty. The paragraph should therefore be reformulated as follows: "Subsequent practice under articles 31 and 32 ... may consist of any conduct which is attributable to a party to the treaty under international law and is in the application of the treaty".

As for paragraph 2 of that draft conclusion, most States had accepted its formulation, although some States had emphasized that international organizations would play a different role from that of other non-State actors. The Commission had indeed recognized, in draft conclusion 12, that the practice of an international organization might contribute to the interpretation of its constituent treaty. Since, however, the draft conclusions had addressed that important case and not specifically other situations outside the purview of the 1969 Vienna Convention on the Law of Treaties, he considered that the general rule, as formulated in paragraph 2, should be maintained.

Draft conclusion 6 (Identification of subsequent agreement and subsequent practice) had received relatively few comments from States, most of which were supportive, with some suggesting minor improvements. In that connection, he accepted the proposal by Ireland to insert the words "for example" in the second sentence of paragraph 1. He had further replaced the word "normally" with "always" in the proposed new text. He had, however, realized subsequently that the latter change might give rise to a fresh misunderstanding and that it might be better to omit both "normally" and "always". Nonetheless, he felt that the Drafting Committee should be able to resolve that minor point easily.

On draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), most of the comments received concerned paragraph 3, which addressed the difficult question of the relationship between an interpretation and an amendment or modification of a treaty, including the possible role that subsequent agreements and subsequent practice might play in that context. The different views expressed on the general question of whether subsequent practice of the parties could lead to the modification of a treaty were not meant to be reconciled by the formulation of the paragraph. It was indeed because the Commission had been aware of the long-standing divergence of views among States and courts that it had chosen the language used in the paragraph, which expressed the widest possible agreement among States and gave a nuanced answer to the question posed. The three sentences in paragraph 3 were interrelated. The commentary offered a variety of sources and described the different points of view that had existed among States at least since the elaboration of the 1969 Vienna Convention; it also provided an explanation for the language chosen in paragraph 3. As that paragraph, while not fully resolving the question for

all conceivable circumstances, offered a general direction and was therefore acceptable, he recommended that the draft conclusion should be maintained in its current form.

Draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time) had likewise been carefully weighed and debated by the Commission. The widespread agreement on its formulation might spring from the fact that the draft conclusion did not claim to resolve the question of evolutive interpretation in the abstract or to adopt one particular theory of such interpretation at the expense of another, but attempted, rather, to address one specific aspect of that question, namely, the possible role of subsequent agreements and subsequent practice in cases where an evolutive interpretation of a term of the treaty was appropriate. However, it did so without seeking to determine the circumstances under which such would be the case, except by providing certain widely accepted examples from international case law.

Some States had nevertheless shown concern about possible misunderstandings of the draft conclusion. The United States, for example, had stated that the term "presumed intention" did not seem to capture the important distinction that while the broad purpose in treaty interpretation set forth in articles 31 and 32 was to discern the intention of the parties, that would not be achieved through an independent inquiry into intention and certainly not into presumed intention. While confirming that broad purpose in treaty interpretation, he recalled that the Commission's traditional position was that such could not be achieved through an independent inquiry into intention.

Since, as was explained in the commentary, the expression "presumed intention" had been chosen precisely to indicate that any interpretation, including one that gave a term a meaning capable of evolving over time, must result from the application of articles 31 and 32 of the 1969 Vienna Convention and its means of interpretation, he did not see a need to further elaborate on the language of the draft conclusion.

Moving on to draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation), which had met with general agreement and a few proposals for improvement, he said that he accepted the proposal by the United Kingdom to include the criteria of "consistency" and "breadth" in paragraph 2 as relevant for the weight of subsequent agreements and subsequent practice, so that the paragraph would read: "The weight of subsequent practice under article 31, paragraph 3 (b) depends, in addition, on its consistency, breadth and on whether and how it is repeated". No further changes were recommended.

On draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty), which had been generally accepted by States, there was an interesting divergence of views between the United States, on the one hand, and Sweden and other States, on the other, over whether it was correct that the parties needed to "be aware of and accept" a subsequent practice or whether the existence of a parallel practice, of which some of the parties were unaware, was sufficient. He considered that the Commission should continue its long-standing approach of requiring "awareness and acceptance" but should at the same time make it clear in the commentary, as indeed it had already done, that in certain circumstances, the awareness and acceptance of the other party or parties might be assumed, particularly in the case of treaties that were implemented at the national level.

Draft conclusion 11 [10] (Decisions adopted within the framework of a Conference of States Parties) had also been generally supported by States, sometimes with minor proposals to improve the text or the commentaries. He did not consider it necessary or even appropriate to make assessments in the text of the draft conclusion regarding the general likelihood of States Parties adopting a subsequent agreement under article 31 (3) (a), of the 1969 Vienna Convention, beyond what was already expressed in the last sentence of paragraph 2.

Draft conclusion 12 [11] (Constituent instruments of international organizations) had received many comments, mostly supportive. Spain and Romania had usefully proposed, in the interests of greater clarity, that the words "of the parties" should be inserted in the first and second lines of paragraph 2, after the words "subsequent practice", to highlight how paragraphs 1 and 2 differed from paragraph 3, whose object was not the subsequent practice of States, but the practice of the international organization as such. He did not consider it necessary, however, to follow the proposal of Romania to further emphasize that difference by inserting the words "as such" after "Practice of an international organization" in paragraph 3, as doing so could give rise to misunderstandings if the paragraph was not read in conjunction with the commentary.

Although States generally supported paragraph 3, some States had expressed concern that it might give too much weight to the practice of international organizations. Greece, in particular had recommended that it should be made clear in the commentary that the practice of an international organization that was not generally accepted by its member States carried less

weight than if it were the case. The purpose of the words "may contribute" in paragraph 3 was indeed to indicate that the weight of the practice of an international organization might vary. It could be stated even more clearly in the commentary that the agreement of the members with such practice was a primary factor for the determination of its weight. The United States and the Russian Federation had gone one step further by proposing that the reference in paragraph 3 to article 31, paragraph 1, of the 1969 Vienna Convention should be removed. However, he considered that the justification for that reference provided by the Commission in its commentary was valid and that the reference to that paragraph was based on key pronouncements in the case law of the International Court of Justice.

Draft conclusion 13 [12] (Pronouncements of expert treaty bodies) had been intensely debated, with particular reference to the "without prejudice" clause in paragraph 4, considered by some States to open further discussion of other ways in which a pronouncement by an expert treaty body could contribute to the interpretation of a treaty. They had therefore requested that the Commission should re-examine the issue, during the second reading, on the basis of observations of Member States.

He recalled that the "without prejudice" clause was what remained of his more ambitious, but nevertheless modest proposal, in his fourth report (A/CN.4/694), to acknowledge the significance of pronouncements of expert treaty bodies, as such, along the lines of the finding of the International Court of Justice and according to other authoritative sources. The Commission had ultimately decided, on the basis of the debate in 2016, to adopt the current "without prejudice" clause in paragraph 4, rather than to take up the proposal contained in his fourth report to include the following wording in what had become draft conclusion 13: "A pronouncement of an expert body, in the application of the treaty under its mandate, may contribute to the interpretation of the treaty when applying articles 31, paragraph 1, and 32". It had taken that decision not because members had called into question his substantive findings and those of the International Court of Justice, but rather because some members had expressed doubts whether pronouncements of expert treaty bodies constituted "practice in the application of the treaty" that would fall within the scope of the topic.

He proposed that the Commission should revisit its decision to replace his original proposal with the current paragraph 4, as "practice in the application of a treaty" was not confined to one particular act on the ground (as, for example, the execution of an order by the police), but often consisted of forms of cooperation among different organs within a State in which not every organ had a competence to make a binding decision. Like international organizations, expert treaty bodies had been created by States to act as their agents in the process of ensuring the proper application of treaties. The fact that such expert treaty bodies did not have the final decision-making power, but were merely an advisory element in the process of correctly applying the treaty, did not distinguish them from State organs that were involved in the application of a treaty without having the final decision-making power. More details about his proposal could be found in paragraphs 137 to 144 of his fifth report (A/CN.4/715).

He also drew members' attention to paragraphs 123 and 133 to 135 of his report, which addressed the second sentence of paragraph 3 of draft conclusion 13 and the role of silence. In that connection, he recalled that the Human Rights Committee had indicated, in a letter dated 4 April 2017 addressed to the Chair of the Commission at the time, that the second sentence, to the effect that "[s]ilence by a party shall not be presumed ... to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body", was too restrictive. The Committee had also indicated that the contribution that pronouncements of expert treaty bodies could make, whether or not they gave rise to a subsequent practice by the parties, would merit clearer recognition in the draft conclusions than in the form of a saving clause in paragraph 4 of the draft conclusion.

His own view was that the sentence was not too restrictive since, while it reflected a broad-based understanding among States regarding the feasibility and desirability, as a general rule, of their reacting to pronouncements of expert treaty bodies, that understanding, as expressed in that sentence, did not exclude the fact that certain kinds of pronouncements by specific expert treaty bodies might under certain circumstances be considered as being accepted by States even if they had not reacted after their adoption.

He noted in conclusion that, with the exception of draft conclusion 13, the draft conclusions rested on a broad-based agreement among States and should therefore require only minor revisions. He hoped that the Commission would be able to adopt the draft conclusions, together with the commentaries, and conclude its work on the topic during the current session.

On that basis, he proposed that the Commission should recommend to the General Assembly to take note of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of

treaties in a resolution, to annex the draft conclusions to the resolution, and to encourage their widest possible dissemination; and to commend the conclusions, together with the commentaries thereto, to the attention of States and all who might be called upon to interpret treaties.

Programme, procedures and working methods of the Commission and its documentation (agenda item 12)

Mr. Šturma (Chair of the Planning Group) announced that the Planning Group would be composed of Mr. Cissé, Ms. Escobar Hernández, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Ms. Galvão Teles (Rapporteur), *ex officio*.

The meeting rose at 5.50 p.m.

Provisional

For participants only

4 June 2018
Original: English

International Law Commission

Seventieth session (first part)

Provisional summary record of the 3391st meeting
Held at Headquarters, New York, on 1 May 2018, at 10 a.m.

Contents

Filling of casual vacancies in the Commission

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)

Organization of the work of the session (*continued*)

This record is subject to correction.

Corrections should be sent as soon as possible, under the signature of a member of the delegation concerned, to the Chief of the Documents Management Section (dms@un.org), and incorporated in a copy of the record.

Corrected records will be reissued electronically on the Official Document System of the United Nations (http://documents.un.org/).

18-06915 (E)

Please recycle

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Filling of casual vacancies in the Commission (agenda item 2) (A/CN.4/721 and A/CN.4/721/Add.1)

The Chair said that the Commission would proceed to fill the seat that had become vacant owing to the resignation of Mr. Roman Anatolyevich Kolodkin. As was customary, the election would be held in a closed meeting.

The meeting was suspended at 10.10 a.m. and resumed at 10.25 a.m.

The Chair announced that Mr. Evgeny Zagaynov had been elected to fill the casual vacancy resulting from the resignation of Mr. Roman Anatolyevich Kolodkin. On behalf of the Commission, he would inform the newly elected member and invite him to take his place in the Commission.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (*continued*) (A/CN.4/712 and A/CN.4/715)

The Chair invited the Commission to resume its consideration of the fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/715).

Mr. Hassouna expressed his gratitude to the Special Rapporteur for his clear and well-structured report, which would provide a sound basis for the second reading of the draft conclusions. He also commended the Secretariat for preparing an analytical table of the comments and observations of States made on the topic in the Sixth Committee of the General Assembly, as well as the written comments and observations received in response to the Commission's request, contained in document A/CN.4/712. Regrettably, however, those written comments and observations, which formed the basis of his recommendations, were limited in number and came mainly from developed States. Although he acknowledged the value of the draft conclusions and commentaries proposed by the Special Rapporteur, he agreed with certain States that the draft conclusions were at times too general and could benefit from additional normative content and clarification, a concern that could largely be met if the draft conclusions were read in conjunction with the commentaries.

He agreed with the Special Rapporteur that draft conclusion 1 [1a] (Introduction) should remain in its current form, as it was purely introductory in nature. On draft conclusion 2 [1] (General rule and means of treaty interpretation), he supported the proposal to reflect more in the commentary the fact that the rules on interpretation applied to treaties predating the 1969 Vienna Convention on the Law of Treaties. He agreed that the meaning of the word "appropriate" used in paragraph 5 should be clarified and that a reference to the nature of the treaty as a relevant factor should be included in the commentary, but not in the text of the draft conclusion. He welcomed the recommended change to the Spanish version of the draft conclusion.

With regard to the formulation of draft conclusion 3 [2] (Subsequent agreements and subsequent practice as authentic means of interpretation), unlike some States, he believed that the terms "objective evidence" and "authentic means of interpretation" were appropriate when describing the nature and role of subsequent agreements and subsequent practice. In relation to paragraph 1 of draft conclusion 4 (Definition of subsequent agreement and subsequent practice), he agreed that it should be specified in the commentary that a subsequent agreement did not have to be a treaty within the meaning of the Vienna Convention, but could also be an informal agreement and a non-binding arrangement. He also agreed that the guidelines of the Commission on reservations to treaties, which dealt with interpretive declarations, should be harmonized with the draft conclusions, and that the definite article "a" at the beginning of paragraph 2 should be deleted. He was not, however, in favour of adding the word "all" to the paragraph to make clear that the agreement of all the parties was required. He supported the proposal that paragraph 3 should be clarified further in the commentary and that the inverted commas around the phrase "subsequent practice" should be moved.

He agreed with the Special Rapporteur's recommendation that paragraph 1 of draft conclusion 5 (Attribution of subsequent practice) should be reformulated, to make it clearer that not every form of conduct that might be attributed to a State under the rules of State responsibility was sufficient to count as subsequent practice for the purpose of treaty interpretation. He also believed that States' concerns about the conduct of non-State actors should be addressed in the commentary, to make it clearer that such conduct could not, as such, be relevant for the interpretation of a treaty. He agreed that reference should be made to draft conclusion 12 [11] in the commentary to the draft conclusion, and that such reference was without prejudice to any other possible effects of the practice of international organizations.

He agreed with the proposal that the term "*modus vivendi*" in paragraph 1 of draft conclusion 6 (Identification of subsequent agreement and subsequent

practice) should be clarified in the commentary, rather than in the draft conclusion. For that purpose, a number of examples could be given. As suggested by the Special Rapporteur, the words "for example" should be inserted after the words "this is not normally the case", and the word "normally" should be removed, to clarify that the proposal mentioned in paragraph 1 was merely an example. With regard to paragraph 2, it would be appropriate to provide in the commentary examples of the forms that subsequent agreements and subsequent practice could take.

With regard to paragraphs 1 and 2 of draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), he supported the idea that the word "clarify" should be further explained in the commentary, to show that it covered all possible effects of article 32 of the Vienna Convention. States had expressed different views on whether the subsequent practice of the parties could lead to the modification of a treaty. The Special Rapporteur right provided a general direction to that question in paragraph 3 without resolving it; he also gave a good description of States' points of view in the commentary. Accordingly, the sentence according to which "[t]he possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized" should be retained. The distinction between interpretation and modification was a complex one, and it should be explained in the commentary rather than in the text of the draft conclusion.

Turning to draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time), he said that, unlike certain States, he did not believe that the issue of interpretation of treaty terms as capable of evolving over time should give rise to any misunderstanding, since the Special Rapporteur had explained that it merely indicated that subsequent agreements and subsequent practice under articles 31 and 32 might assist in determining whether the meaning of a term was capable of evolving over time; he had not claimed that the ability to evolve depended only on the willingness of the parties to the treaty.

It was important to distinguish between, on the one hand, repeated practice as a means of interpreting an international treaty and, on the other hand, practice that led to the formation of a norm of customary international law. That distinction should be referred to in the commentary to draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation), or in the commentary to another draft conclusion of a more general nature. The weight of a subsequent agreement and that of a subsequent practice could be referred to in separate paragraphs to clarify the distinction. He agreed that in paragraph 2 of the draft conclusion, which referred exclusively to subsequent practice, the criteria of consistency and breadth should be mentioned as possible factors for determining the weight of subsequent practice.

With regard to paragraph 1 of draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty), he agreed that the sentence according to which "[t]hough it shall be taken into account, such an agreement need not be legally binding" should be clarified and better drafted. He saw merit in the idea that reference should be made in the commentary both to binding agreements and to agreements which, although not binding, could be taken into account. However, the word "though" at the beginning of the sentence was misleading. The sentence should be reformulated, either to say that "such an agreement need not be legally binding for it to be taken into account" or, as suggested by the Special Rapporteur, to say that "[s]uch an agreement, may, but need not necessarily be, legally binding for it to be taken into account".

One State had raised the concern that paragraph 2 of draft conclusion 11 [10] (Decisions adopted within the framework of a conference of States parties) might suggest that the work of conferences of States parties generally involved acts that might constitute subsequent agreements or subsequent practice. As it stood, paragraph 2 did not completely allay that concern, despite the indication in the last sentence that decisions adopted within the framework of a conference of States parties often provided a non-exclusive range of practical options for implementing the treaty. Further clarification should therefore be provided in the commentary. With regard to paragraph 3, he also agreed that it should be made clear in the commentary that the same principles would apply to other forums that constituted meetings of States parties to a particular treaty. He did not, however, agree with the proposal that the reference to consensus at the end of the paragraph should be moved to the commentary on the grounds that it could lead to misrepresentation. Nor should the phrase "including by consensus" be placed in brackets: doing so might suggest that the phrase did not belong in the sentence. The relevant section might be reformulated to read: "regardless of the form and procedure by which the decision was adopted, whether by majority or consensus".

He agreed that there was a need to distinguish more clearly in paragraphs 2 and 3 of draft conclusion 12 [11] (Constituent instruments of international organizations) between, on the one hand,

subsequent agreements and subsequent practice of the States parties to a constituent instrument of an international organization and, on the other hand, the practice of an international organization as such. He therefore supported the Special Rapporteur's recommendation that the words "of the parties" could be inserted after the words "subsequent practice" in paragraph 2. As for paragraph 3, a clear criterion should be included in the commentary concerning the weight to be given to the practice of international organizations. For instance, it could be stated that the practice of an international organization generally accepted by its members States carried more weight, or that the members' agreement to such a practice was a primary factor in determining its weight. He supported the view that the Commission should continue to distinguish between the law between States and the law of international organizations. It was therefore not desirable for the scope of the draft conclusions to be extended to treaties that fell under the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

It should be made clear in the commentary that the term "international organizations" referred simply to intergovernmental organizations. He did not agree, however, with the proposal to distinguish, in the draft conclusion or in the commentary, between the different organs of an international organization, given that there was a huge variety of such organizations. He supported the Special Rapporteur's proposal that a sentence should be included in the commentaries according to which the rules on the responsibility of international organizations and the considerations underlying draft conclusion 5 applied mutatis mutandis. Moreover, in order to distinguish between the subsequent practice and agreements of States, on the one hand, and the subsequent practice of the international organization, on the other hand, he agreed that reference should be made in the commentary to the need to identify the intention of the State concerned, as well as the content and circumstances of the organ's decision.

With regard to the need to elaborate on the relevance of silence in the draft conclusion, the Special Rapporteur had proposed adding a sentence in paragraph (22) of the commentary referring to a recent judgment of the European Court of Justice in the *Europäische Schule München v. Silvana Oberto and Barbara O'Leary* case. That proposal should be clearly explained. While the European examples cited in the commentary regarding the expression "rules of the organization" in paragraph 4 were welcome, examples from other regions would also be appropriate.

After a thorough debate within the Commission, the Special Rapporteur had agreed to make significant changes to his original draft conclusion 13 [12] (Pronouncements of expert treaty bodies). That display of flexibility was commendable. As a general rule, he agreed with the Special Rapporteur that the value of pronouncements of expert treaty bodies for the interpretation of treaties should not be overestimated, especially where an attempt was being made to modify or amend such treaties. He supported the proposal to replace the word "rules" in paragraph 2 with "terms", in reference to a treaty, as the latter was a common formulation. He was also in favour of replacing the phrase "shall not be presumed to constitute subsequent practice" in paragraph 3 with "shall not be presumed to constitute its acceptance of a subsequent practice". The word "accepting" should be replaced with "following", something that would be consistent with the recommendation of the Special Rapporteur. The "without prejudice" clause in paragraph 4 represented a compromise solution that had been added by the Commission after a lengthy debate, and should therefore be retained, despite the Special Rapporteur's proposal to reopen the debate.

With regard to the final form of the draft conclusions, he was in favour of retaining the term "conclusions". He also supported the Special Rapporteur's proposed recommendations to the General Assembly.

In conclusion, he congratulated the Special Rapporteur for his work, which represented an important achievement and a significant contribution to the codification of international law.

Mr. Park said that he wished to commend the Special Rapporteur's considerable effort in finalizing his fifth report. The fact that Member States had not raised fundamental concerns showed that the Special Rapporteur's work had been well-received and was near completion. The Special Rapporteur's responses to States' comments were also generally appropriate.

In paragraph 1 of draft conclusion 4, it would be useful to insert the word "all" before "the parties", because a subsequent agreement under article 31 (3) (a) of the Vienna Convention referred to an agreement among all the parties; the Special Rapporteur had stated as much in the commentary and in his report. It would, however, be worth making that point in the draft conclusion, as opposed to in the commentary. That proposed change would not apply, however, to paragraph 3, which referred to conduct by one or more parties. While the change would logically apply to paragraph 2, he was hesitant because paragraph 2 of

draft conclusion 10, on the agreement of the parties regarding the interpretation of a treaty, provided for the possibility of silence on the part of one or more parties.

The Special Rapporteur had proposed moving the phrase "in application of the treaty" to the end of paragraph 1 of draft conclusion 5. That change was intended to make it clear that actions taken by a State official, while attributable to that State, could not constitute subsequent practice for the purposes of interpreting the treaty. While agreeing with that intention, he believed that the proposed change merely created additional difficulties. He therefore suggested deleting the phrase altogether. The words "may consist of", which already appeared in paragraph 1, adequately addressed the problem.

With regard to draft conclusion 6, he agreed in principle with the concern that had led the Special Rapporteur to recommend that, in the second sentence of paragraph 1, the word "normally" should be replaced with "always" and that the words "for example", preceded by a comma, should be inserted between the words "case" and "if". The proposed wording was intended to make clear the illustrative nature of the reference to temporary non-application or *modus vivendi*, which were given as two types of cases that did not constitute subsequent agreements or subsequent practice under article 31 of the Vienna Convention. However, replacing the word "normally" with the word "always" could increase the possibility of such agreements being considered subsequent agreements or subsequent practice under article 31. He was thus not convinced that the Special Rapporteur's suggestion was in line with the commentary in that regard.

The current formulation of draft conclusion 7, paragraph 3, seemed to adequately cover the divergent views that had been expressed during in-depth debates within the Commission, in particular in the Drafting Committee, on the question of whether subsequent practice of the parties could lead to the modification of a treaty.

Turning to draft conclusion 9, he recalled that the Special Rapporteur had proposed inserting the words "on its consistency, breadth and" in paragraph 2, between the words "addition" and "on", in response to a suggestion by the United Kingdom. However, the proposed amendment was unnecessary and even inconsistent with other parts of the text. It was not clear to him whether "breadth" was meant to refer to "narrowing" or "widening", since the second sentence of the first paragraph of draft conclusion 7 contained both terms. Furthermore, the word "consistency" might be redundant, given that the phrase "how it is repeated" already appeared in the draft conclusion, and further clarification could be provided in the commentary.

With regard to the draft conclusion 10, he considered that it would be appropriate to retain the text as it stood. It would also be advisable to retain the current text of draft conclusion 11. As noted by Mr. Hassouna, the Special Rapporteur's suggestion of putting the words "including by consensus" in brackets could create more confusion.

He supported the Special Rapporteur's proposal to insert the words "of the parties" between the words "practice" and "under" in paragraph 2 of draft conclusion 12. As many States had pointed out, it was necessary to distinguish between the subsequent practice and subsequent agreements of States, on the one hand, and the subsequent practice of international organizations, on the other.

He did not entirely agree with the Special Rapporteur's recommended amendments to draft conclusion 13. In its current formulation, the draft conclusion represented a compromise between members of the Commission who had had diverging views about the Special Rapporteur's initial proposal. It should also be recalled that the proposed new paragraph, which would give the role of expert treaty bodies recognition beyond that expressed in the "without prejudice" clause in the current paragraph 4, was not new; the Commission had decided not to adopt a similar proposal made by the Special Rapporteur in his fourth report. The insertion of the new paragraph between the existing paragraphs 3 and 4 would have two major consequences. First, the relationship between the new paragraph and the current paragraph 4 would be unclear and generate unnecessary confusion. Secondly, it would be impossible to maintain a balance between the progressive approach and the conservative approach to the role of expert treaty bodies. However, he was not opposed to the consideration of the proposed changes to the current paragraph 3.

He supported the Special Rapporteur's position on the final form of the draft conclusions. He appreciated the efforts of the Special Rapporteur and his contribution to the finalization of the draft conclusions, and hoped that the Commission would be able to adopt the draft conclusions on second reading during the current session.

Mr. Murphy commended the Special Rapporteur on his cooperative spirit and extraordinary work on the topic over the years, which would no doubt be successfully concluded in the current session.

While States were generally supportive of the Commission's draft conclusions on the topic, they had expressed a number of serious concerns that called for changes not only in the draft conclusions themselves but also in the commentary, some of which had been satisfactorily addressed by the changes proposed by the Special Rapporteur. However, additional changes to some of the draft conclusions were warranted where they pointed out an error, inconsistency or unhelpful ambiguity in the Commission's work. Furthermore, given that the current topic and that of identification of customary international law were in their final stages, it was appropriate to consider cross-over aspects between the two topics to ensure consistency in the way they were handled.

Several States had expressed concerns regarding paragraph 1 of draft conclusion 5, with some viewing the concept of attribution as inappropriate in the context of identifying the relevance of the subsequent practice of States or parties to a treaty. The Special Rapporteur had attempted to address those concerns through a modest fix, but the best solution would be to reformulate the paragraph to mirror draft conclusion 5 on identification of customary international law, which had moved away from the idea of attribution to a formulation that had been readily accepted by States. Thus, paragraph 1 could read: "Subsequent practice under articles 31 and 32 may consist of any conduct of the party to the treaty, whether in the exercise of its executive, legislative, judicial or other functions."

With respect to draft conclusion 7, paragraph 3, the Czech Republic was correct to indicate that there was no basis for the presumption expressed in the first sentence, at least as it related to a subsequent agreement. If, for example, two States concluded a bilateral treaty and decided five years later to conclude an agreement relating to that treaty, that agreement might be either interpreting the bilateral treaty or amending it. There was no basis for saying that there was a presumption in favour of one type of agreement or the other. The simplest solution would be to delete that sentence.

In relation to draft conclusion 8, he agreed with the Czech Republic and the United States that the word "presumed" should be deleted, as it appeared to be confusing. Unless the Special Rapporteur could explain why "presumed intention" was a superior formulation to "intention", the latter should be used.

He did not support the changes to paragraph 2 of draft conclusion 9 proposed by the Special Rapporteur in response to a suggestion by the United Kingdom. It was critical to understand that, at the current stage of its work, the Commission had already established that there was a subsequent practice of the parties under article 31 (3) (b) of the Vienna Convention. That meant, therefore, that there was already a subsequent practice establishing the agreement of all the parties to the treaty. The question that required clarification was how much weight should be given to that subsequent practice. It made no sense to suggest that factors such as consistency or breadth of the practice were of any further relevance; consistency and breadth must already exist for the practice to establish the agreement of all the parties. Indeed, introducing such changes to paragraph 2 would seem to be reopening the debate on whether subsequent practice of the parties within the meaning of article 31 (3) (b) existed at all.

Several States had proposed clarifying the language of draft conclusion 10, paragraph 1, in particular the second sentence. Like Mr. Hassouna, he supported the improvement proposed by the Special Rapporteur, in paragraph 90 of his report, whereby the sentence would read: "Such an agreement may, but need not necessarily be, legally binding for it to be taken into account." He hoped the issue would be pursued in the Drafting Committee. However, the first sentence also needed improvement. With its reference to a "common understanding ... which the parties are aware of", it seemed to imply that each of the parties must be aware of a common understanding, which made sense for a subsequent agreement under article 31 (3) (a) of the Vienna Convention, but was not a requirement in the context of subsequent practice under article 31 (3) (b). As a case in point, if all the supreme courts of the States parties to a treaty interpreted an ambiguous provision of the treaty in the same way, without any awareness of each other's decisions, those decisions would constitute subsequent practice in the application of the treaty which established the agreement of the parties regarding the interpretation of that provision. There was no need to further establish that each supreme court was aware of a common understanding among all the supreme courts involved. Indeed, such a requirement would make article 31 (3) (b) no different from article 31 (3) (a), because a subsequent agreement between the parties would be required for both. A very simple solution would be to delete the words "a common" in the first sentence and replace them with "the same", so that it read: "... requires the same understanding regarding the interpretation of a treaty which the parties are aware of and accept."

The comments made by Governments with respect to draft conclusion 11 indicated some concern that decisions of conferences of States parties should not be too readily regarded as a subsequent agreement or subsequent practice under article 31 (3) of the Vienna

Convention. With respect to paragraph 3 of the draft conclusion, unlike Mr. Hassouna and Mr. Park, he fully supported the Special Rapporteur's suggestion that the words "including by consensus" should be placed in parentheses, and hoped that the point would be pursued in the Drafting Committee. The current formulation, which had the clause appearing at the end of the paragraph, might be interpreted as referring, not to the immediate prior clause, but to the one before that. Inserting parentheses would make it much clearer that it was intended to modify the immediate prior clause. The words "in substance" could be deleted from the paragraph, as they seemed to suggest that something less than a full agreement of the parties was required. Such qualifying language was not used in other draft conclusions when reference was made to an agreement. It would also be prudent to insert the word "all" before "the parties", given that not all the parties to a treaty were necessarily present at a conference of States parties, and yet all of them must be present for there to be a "subsequent agreement" based on a decision at the conference.

Though States generally supported draft conclusion 12, which dealt with the constituent instruments of international organizations, many had offered specific comments that should be addressed, in particular regarding the reference in paragraph 3 to article 31 (1) of the Vienna Convention. It was worth recalling that that reference had been added in the Drafting Committee at the last minute, and had not been part of the Special Rapporteur's original analysis and proposal for the draft conclusion. The central problem was that the subsequent practice of an international organization could not be regarded as part of any of the elements set forth in article 31 (1). It was certainly not part of the text or context of the treaty, nor could it be considered part of the object or purpose of the treaty.

The Special Rapporteur maintained that the reference was appropriate, on the basis of case law of the International Court of Justice, but those judgments did not indicate that the practice of an international organization contributed to the interpretation of a treaty pursuant to article 31 (1). Rather, in each instance, the Court clearly viewed the practice of the international organization as an element separate from article 31 (1). The Special Rapporteur also relied on a 2013 judgment of the Caribbean Court of Justice, but that decision made no reference to article 31 (1). Moreover, the Caribbean Court of Justice did not use the practice of an organ of the Caribbean Community (CARICOM) to ascertain the object and purpose of the Revised Treaty of Chaguaramas. It used such practice because specific articles of the Treaty either referred to the undertakings of member States to carry out the obligations arising out of decisions of CARICOM organs (article 9) or referred to a right conferred by or under the Treaty (article 222). In short, the practice of the organ was relevant owing to the powers conferred upon it, not to its ability to reveal any information about the object and purpose of the treaty.

However, even if it was accepted that the practice of an international organization in the application of its treaty was sometimes intended to fulfil the object and purpose of the treaty, that was not the same as accepting that the practice itself constituted the object and purpose of the treaty, which was the implication of the reference to article 31 (1). An interpreter seeking to determine the object and purpose of a treaty constituting an international organization would look at the treaty itself, not at subsequent events, such as court decisions, scholarly writings or the practice of the organization, including an opinion of the organization's legal counsel. Such subsequent events might serve as a guide to the object and purpose of a treaty, but it would be completely incorrect to say that they were constitutive of the object and purpose of the treaty. Indeed, a real danger with the reference to article 31 (1) was that it might elevate the practice of the international organization to a position superior to that of the practice of the parties to the treaty (article 31 (3)). That simply could not be correct. Paragraph 3 of draft conclusion 12 should be amended to mirror the current wording of paragraph 4 of draft conclusion 13, to read: "This draft conclusion is without prejudice to the contribution that the practice of an international organization may otherwise make to the interpretation of a treaty."

Regarding draft conclusion 13, the Special Rapporteur had surprisingly decided to reintroduce, as a new paragraph between paragraphs 3 and 4, a proposal he had previously made that had been thoroughly debated and rejected by the Commission, even though no State had requested that he do so. In resurrecting his proposal, the Special Rapporteur had failed to note that some States, such as the Czech Republic, did not even like the "without prejudice" clause in paragraph 4, which he basically wished to enhance. For the same reason that the Commission had rejected the proposal in 2016, it should reject it again in 2018. The problem was not just about the scope of the topic, which was how the Special Rapporteur had characterized the issue. It was certainly true that the pronouncements of expert treaty bodies did not represent subsequent practice of the parties to a treaty and were therefore not part of the topic. However, the focus of the topic under consideration was the subsequent agreements and subsequent practice of the parties to a treaty; suddenly

inserting other forms of action into the equation, as though they were comparable, would be confusing. Indeed, a large number of States had indicated that they would be concerned if the Commission were to create an implication that pronouncements of expert treaty bodies constituted subsequent practice. Yet, adding the Special Rapporteur's resurrected paragraph would do exactly that. Moreover, the implication would be made even worse is such pronouncements were said to be constitutive of the object and purpose of the treaty, a sudden development for the topic that would catch States completely off guard. The Special Rapporteur's proposed addition of a new paragraph to draft conclusion 13 should therefore not be accepted by the Commission.

In conclusion, he commended the Special Rapporteur for his extraordinary effort in moving forward a topic that addressed very complicated issues. He also supported the referral of the draft conclusions to the Drafting Committee.

Mr. Hmoud sought further clarification about Mr. Murphy's concerns regarding the current formulation of draft conclusion 5, paragraph 1, in respect of the conduct of organs of the State in the performance of their judicial, administrative and executive functions. It was his understanding that that formulation was the same as the formulation relating to attribution under State responsibility. He wondered what kind of attribution Mr. Murphy wished to exclude.

Mr. Murphy said that a similar issue had arisen regarding the topic of identification of customary international law. The Commission had considered characterizing the relevant practice of a State as turning on attribution in some way, which, of course, triggered the concept of State responsibility. However, a decision had been taken to move away from the concept of attribution and to speak more broadly about the conduct of the party in the exercise of its various functions. That had helped avoid the confusion about *intra vires* and *ultra vires* conduct in matters of that type, which arose when talking about attribution. His proposal was therefore to see whether there was any possibility of harmonizing the approach taken in draft conclusion 13 with the approach taken in draft conclusion 5 on identification of customary international law.

The meeting was suspended at 11.40 a.m. and resumed at 12 noon.

Mr. Tladi said that he wished to commend the Special Rapporteur on his report and on his hard work, dedication and leadership throughout the Commission's consideration of a very important topic.

He had been somewhat sceptical when the topic had been placed on the agenda as a "normal topic", and had questioned whether the Commission would be able to adopt draft conclusions that had sufficient normative content to be useful, without rewriting the 1969 Vienna Convention. However, as had been clear from the Special Rapporteur's introduction of his report, the Commission had achieved a balance for the most part, thanks to the interplay between the ambition of some members — which might have resulted in the rewriting of the Convention — and the conservative approach of others, which could have led to a meaningless and purely descriptive text. That delicate and sophisticated dance had led to a general acceptance of the product; he therefore joined the Special Rapporteur in cautioning members against undoing its results.

He agreed with most of the Special Rapporteur's recommendations. In his introduction, the Special Rapporteur had suggested that few written observations had been received on the topic because of the consensus-building approach that had been taken. Unfortunately, that was not the case; it was common for few written observations to be received. For that reason, he endorsed the Special Rapporteur's decision not to limit the consideration of comments from States to the observations received at the time of writing of the report. Many States, for reasons that were known, did not submit comments in writing; therefore, an over-reliance on written submissions could result in a loss of balance. According to footnote 6 of his report (A/CN.4/715), not a single African or Asian State, and only one Latin American State, had submitted written observations.

The Special Rapporteur had reported that, in reference to a statement made in the commentary to draft conclusion 3, Poland had found it difficult to agree that subsequent agreements were not necessarily binding. The Special Rapporteur had responded by referring to the discussions concerning the phrase "legally binding" in draft conclusion 10. Yet, that phrase referred to the legal nature or form of the agreement, rather than to its consequence for legal interpretation, which was the subject of the commentary to draft conclusion 3. The Commission was correct on both fronts to conclude that the agreements were not legally binding; with respect to the consequences for interpretation, subsequent agreements and subsequent practice were not conclusive, being only a means to be taken into account, while with regard to the legal nature of the agreement, subsequent agreements did not need to be binding.

In connection with the above, while agreeing with Austria and the United Kingdom that draft conclusion 4,

paragraph 1, should specify that a subsequent agreement need not be legally binding, he was willing to go along with the Special Rapporteur's assertion that the matter had already been made sufficiently clear in draft conclusion 10.

Regarding draft conclusion 5, paragraph 1, in response to comments from Ireland and the United States that not every act attributable to a State under international law could constitute subsequent practice under article 31 (3) of the Vienna Convention, the Special Rapporteur had recommended moving the words "in the application of a treaty" to the end of the sentence. Although he was not opposed to the Special Rapporteur's recommendation, he did not support it. He did not have any firm proposals to address the concerns of Ireland and the United States, but he doubted that the fix proposed by the Special Rapporteur would do so. The United States, for example, had referred to conduct by a State agent that was "contrary to instructions". Presumably, those actions could also be "in the application of a treaty". There were two possible solutions. First, although he would not be in favour of it, the Commission could decide and explain in the commentary that the word "may" made it clear that not all such conduct constituted subsequent practice. Secondly, a more difficult but preferable solution would be for the Drafting Committee to try to find a formulation that would be included in the commentary and that would require, over and above attribution, some level of government awareness and acceptance of the conduct, in order to address the concerns of those States. The Special Rapporteur was on the right track when he indicated in his report that such conduct must also be undertaken in a "recognized application of the treaty". He had not had the opportunity to fully examine the proposal made by Mr. Murphy, but he was willing to consider it as a possible fix in the Drafting Committee.

He supported the Special Rapporteur's recommendation to amend the second sentence of draft conclusion 6, paragraph 1, on the strength of the comments made by Ireland. He had never liked that sentence, but the amendment made it somewhat more bearable. He also concurred with the Special Rapporteur, as indicated in his introduction, that while his decision to replace the word "normally" with "always" might raise new difficulties, that was something that the Drafting Committee might be able to address.

From the beginning, he had had some difficulty with the inclusion of draft conclusion 7, paragraph 3. Indeed, the current wording, which he did not disagree with, had been arrived at following a lengthy debate that had incidentally been linked to the question of whether subsequent agreements and subsequent practice had binding effects. By even venturing into the discussion, the Commission was moving beyond the scope of article 31 (3) and into areas not falling within the current topic, including modification. Thus, while the final wording chosen by the Commission might meet with his agreement, he was still unsure whether the Commission should be venturing into such areas. He was therefore not surprised that the Special Rapporteur had indicated that there had been such a divergence of views among States regarding that particular paragraph.

Prior to the current meeting, he could have accepted the Special Rapporteur's recommendation to amend the second paragraph of draft conclusion 9 in response to the comments of El Salvador, the Russian Federation and the United Kingdom. Regarding the comment made by Mr. Park concerning the use of the word "breadth", he said that in the current context it referred to how often the practice occurred, rather than to whether the practice narrowed or widened the interpretation of a treaty. That said, he took the point made by Mr. Murphy that the Commission had already determined the existence of subsequent practice establishing the agreement of the parties, so it might be problematic to include such wording in the draft conclusion. Again, that could be discussed in the Drafting Committee.

With respect to draft conclusion 10, paragraph 1, he supported the amendment to the second sentence proposed by Ireland, since it more accurately reflected what the Commission was trying to achieve with that sentence and ought to be considered.

The Special Rapporteur had spent some time explaining why the amendment to draft conclusion 13 should be accepted. That was the only one of the Special Rapporteur's recommendations to which he was strongly opposed. However, he did not disagree with its content. The pronouncements of expert treaty bodies could, of course, contribute to interpretation under the Vienna rules. However, he did not think that the issue was part of the topic.

Not all true statements that related to interpretation deserved to be reflected in the draft conclusions. For example, judgments of international courts could contribute to the interpretation of treaties, but they were not included in the draft conclusions, because they did not constitute subsequent practice, as defined by the Commission. Important though they might be, pronouncements by expert treaty bodies were not subsequent agreements or subsequent practice, as defined, and they therefore fell outside the scope of the topic. If the Commission wished to determine the role

of such pronouncements, it should include that topic on its agenda, so that it could be examined in all its dimensions. As already noted by Mr. Park, Mr. Hassouna and Mr. Murphy, draft conclusion 13 had been the product of a careful compromise. The Commission had succeeded in striking a balance between normative relevance and faithfulness to the Vienna Convention in the draft conclusion. Inserting wording that had already been rejected by the Commission would threaten that balance and the Commission should refrain from disturbing it. He fully shared Mr. Park's comments in that regard.

In conclusion, he thanked the Special Rapporteur for his hard work and leadership role in helping to bring the topic to a successful conclusion.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on the topic of peremptory norms of general international law (*jus cogens*) was composed of Mr. Cissé, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Huang, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Tladi (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), ex officio.

The meeting rose at 12.25 p.m.

Provisional

For participants only

6 June 2018
Original: English

International Law Commission

Seventieth session (first part)

Provisional summary record of the 3392nd meeting
Held at Headquarters, New York, on Tuesday, 1 May 2018, at 3 p.m.

Contents

Commemoration of the seventieth anniversary of the Commission

This record is subject to correction.

Corrections should be sent as soon as possible, under the signature of a member of the delegation concerned, to the Chief of the Documents Management Section (dms@un.org), and incorporated in a copy of the record.

Corrected records will be reissued electronically on the Official Document System of the United Nations (http://documents.un.org/).

18-06918 (E)

Please recycle

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3 p.m.

Commemoration of the seventieth anniversary of the Commission (agenda item 11)

The Chair said that the Commission would commemorate its seventieth anniversary with events organized in New York and Geneva under the theme "70 years of the International Law Commission — Drawing a balance for the future". In New York, on 21 May 2018, the Commission would convene a solemn meeting, to be followed by two panel discussions on the relationship between the Commission and the Sixth Committee of the General Assembly, one focusing on structural challenges to the progressive development of international law and its codification, and the other addressing the interaction between the two bodies in the past and future. The events to be held in Geneva on 5 and 6 July 2018 would include a solemn meeting and discussions with legal advisers from capitals and other international law experts focusing on practical matters concerning the Commission and its cooperation with Member States in the progressive development of international law and its codification.

Mr. Nolte, speaking in his capacity as Chair of the advisory group on the commemoration of the seventieth anniversary of the Commission, said that the Codification Division had made all the necessary preparatory arrangements for the commemorative events under the guidance of the advisory group. On the basis of the working paper presented by the advisory group for consideration by the Planning Group of the Commission in 2017, the advisory group, assisted by the secretariat, had made further arrangements and had included regional groups in relevant decision-making.

Invitations to the events in New York had been sent to the Secretary-General of the United Nations, the President of the General Assembly, the President and judges of the International Court of Justice, the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, the Chair and representatives of the Sixth Committee, former Commission members and previous secretaries of the Commission. The United Nations Legal Counsel, representing the Secretary-General; the President of the General Assembly; the Chair of the Sixth Committee; Ambassador Jürg Lauber, Permanent Representative of Switzerland, representing the host State of the Commission; and Ms. Jennifer Newstead, Legal Adviser of the United States Department of State, representing the host State of United Nations Headquarters, had confirmed their participation in the solemn meeting, and Nico Schrijver, Professor of Public International Law at Leiden University and President of the Institute of International Law, would deliver a keynote speech. The discussions leading the two panel discussions on the relationship between the Commission and the Sixth Committee would include Commission members, legal advisers from capitals and Sixth Committee representatives.

Invitations to the events in Geneva had been sent to the President of Switzerland, the Director-General of the United Nations Office at Geneva, the President and judges of the International Court of Justice, the United Nations Legal Counsel, the United Nations Deputy High Commissioner for Human Rights, legal advisers from capitals, former Commission members and previous secretaries of the Commission. The Director-General of the United Nations Office at Geneva; the United Nations Legal Counsel, representing the Secretary-General; the head of the Directorate of International Law of the Ministry of Foreign Affairs of Switzerland, representing the host State; and the United Nations Deputy High Commissioner for Human Rights were expected to speak at the solemn meeting, and the President of the International Court of Justice would deliver a keynote speech. Five panel discussions would be held, addressing the impact of the Commission's work, its working methods, its function, the changing landscape of international law, and the authority and membership of the Commission in the future. In each case, papers prepared by members of academia would be presented and discussed. Furthermore, a photography exhibition on the Commission's accomplishments and the history of codification of international law was currently on display in New York and would subsequently be mounted in Geneva and in The Hague.

In considering the draft programme of commemorative events in New York and Geneva, the advisory group had consistently operated in a spirit of consensus and sought to select participants on the basis of their professional excellence, while achieving appropriate regional representation and gender balance. He suggested that the Commission should take note of the draft programme of events, which had been circulated to members and would soon be finalized. In addition, in consultation with the United Nations Publications Board, the Commission was making arrangements for the proceedings of the events to be published by a reputable publisher. A registration platform for the events in New York and Geneva was accessible through the Commission's website.

He welcomed the efforts of Commission members who had assisted in securing from Governments significant voluntary contributions to the trust fund for the Office of Legal Affairs to support the promotion of international law in order to facilitate the commemoration of the Commission's seventieth

anniversary, pursuant to General Assembly resolution 72/116. Those contributions would cover expenses and incidental costs related to the organization of the events in New York and Geneva, including the travel of keynote speakers and panellists; the preparation of promotional material; the mounting of the photography exhibition; decorations, music and refreshments at the conference hall in Geneva; and receptions. Some resources would also be reserved for the publication of the event proceedings with a view to ensuring that it was readily available to potential users, including from developing countries.

With regard to cash contributions, the Government of Chile had pledged $50,000; the Government of China had pledged $10,000; the Government of Finland had pledged 10,000 euros; the Government of Ireland had pledged $10,000; the Government of Portugal had pledged $5,043; the Government of Qatar had pledged $10,000; the Government of Singapore had pledged $5,000; and the Government of the United Kingdom had pledged 5,000 pounds. In addition, Istanbul Bilgi University had pledged $5,000, while contributions from other institutions and individuals had collectively amounted to $4,000. As for in-kind contributions, the Governments of India, Japan and Viet Nam would host the lunch reception in New York on 21 May 2018; the Governments of the Republic of Korea and Portugal would host the reception for the official launch of the photography exhibition in New York on 21 May 2018; the Government of Romania would host the evening reception in New York on 21 May 2018; the Government of Germany would host the lunch reception in Geneva on 5 July 2018; the Government of Switzerland would provide the music during the solemn event and would host the evening reception in Geneva on 5 July 2018; and the Governments of Austria and the Czech Republic would host the lunch reception in Geneva on 6 July 2018.

Mr. Llewellyn (Secretary to the Commission) said that the advisory group had provided the secretariat with the information required to carry out the preparations for the commemoration of the Commission's seventieth session. The secretariat had held a briefing for members of the Sixth Committee prior to the commemorative events in New York, during which Committee members had expressed their interest in participating in the panel discussions on the relationship between the Committee and the Commission. Similar briefings would be held following the events in New York and Geneva. A finalized programme of events would be circulated as soon as possible, and the solemn meetings in New York and Geneva would be broadcast on United Nations Web TV. It was worth noting that the photography exhibition already on display featured the names of those countries and institutions that had contributed in cash and in kind to the trust fund for the Office of Legal Affairs to support the promotion of international law.

The Chair said that, in addition to the events scheduled for 21 May 2018 and 5 and 6 July 2018, a number of other commemorative events had been planned, many of which were listed on the Commission's website. For instance, on 17 May 2018, the Permanent Representative of Colombia would host a reception and, on 18 May 2018, it would sponsor a symposium on the draft articles on the protection of persons in the event of disasters adopted by the Commission at its sixty-eighth session. A number of other events had been also organized by the United Nations Headquarters Library, permanent missions, and members and friends of the Commission. He requested the secretariat to circulate an updated list of the events to Commission members. The overwhelming contributions made by Member States to the trust fund for the Office of Legal Affairs to support the promotion of international law would ensure the success of the commemorative events in New York and Geneva. He commended the secretariat on the quality of the photography exhibition on the historical achievements of the Commission.

Mr. Grossman Guiloff commended the work of the advisory group, which had successfully navigated the complexities of bringing together the various groups involved, ensuring the relevance of the planned events and establishing meaningful programme content that looked both to the past and to the future.

Mr. Reinisch, expressing his gratitude to the members of the advisory group, said that some former members of the Commission who had registered to attend the commemorative events in New York or Geneva wished to know whether they would also be required to register the assistants who would accompany them to the events.

Mr. Llewellyn (Secretary to the Commission) said that if current Commission members had assistants already with them for the part of the session being held in New York or Geneva, those individuals would be in the system and no additional registration would be required. However, any assistants to be brought in specifically for the commemorative events would need to be registered.

Responding to a question from **Ms. Oral**, he confirmed that a commemorative photograph of all members would be taken to mark the seventieth anniversary of the Commission. He would consult with

the Chair to arrange when and where the photograph would be taken.

Mr. Al-Marri said that he was pleased to support the Commission as much as possible, both in his role as Chair of the Rule of Law & Anti-Corruption Center Geneva and through his contact with the Permanent Representative of Qatar to the United Nations at Geneva. He stood ready to provide further assistance as required and would be grateful if the secretariat could advise what would be helpful. He would also host a lunch for the members of the Commission during the second week of its work in Geneva in July 2018.

The Chair expressed appreciation for Mr. Al-Marri's offer of assistance and his continued generosity towards the Commission.

Mr. Jalloh commended the advisory group for balancing all the various factors involved in preparing the programme of work and thanked all members of the Commission who had assisted with fundraising for the commemorative events. With regard to the publication mentioned by Mr. Nolte, he understood that only those members of the Commission who were to speak at the commemorative events had been invited to prepare papers for inclusion in the publication; he would like to know whether consideration had been given to the possible contribution of papers by other members. He also wondered whether all former members of the Commission; representatives of the African Union Commission on International Law, Inter-American Juridical Committee and other bodies that regularly cooperated with the Commission; and certain academic researchers should be invited to the events. Lastly, he was organizing a symposium at his university in celebration of the Commission's seventieth anniversary and hoped that some Commission members would be interested in speaking at that event, although funding was limited.

Mr. Nolte, speaking in his capacity as Chair of the advisory group on the commemoration of the seventieth anniversary of the Commission, said that the advisory group had not considered the possibility of inviting Commission members other than those participating in the commemorative events to contribute papers for the publication. Such contributions might perhaps be envisaged but might raise questions of balance so he could not provide a definitive answer at present. All former members of the Commission had already been invited to attend the commemorative events; however, additional invitations might be extended to some other individuals, such as members of the International Council of Environmental Law. Extending invitations at short notice might give rise to practical problems; nonetheless, any member who wished to propose additional invitees, without financial implications, should inform the Chair, the secretariat or himself so that a decision could be taken on the individual merits. He expressed his appreciation to the Secretary of the Commission for all the support provided in ensuring the smooth preparation of the commemorative events and stressed that the secretariat was the backbone of all of the Commission's activities.

Mr. Llewellyn (Secretary to the Commission) said that the collaboration between the advisory group and the secretariat had been smooth and effective. Replying to Mr. Jalloh's question, he confirmed that representatives of the African Union Commission on International Law, the Committee of Legal Advisers on Public International Law of the Council of Europe, the Asian-African Legal Consultative Organization and the Inter-American Juridical Committee had been invited to attend the commemorative events.

The Chair suggested that the members of the Commission should take note of the oral report presented by Mr. Nolte in his capacity as chair of the advisory group on the commemoration of the seventieth anniversary of the Commission and the circulated draft programme for the events in New York and Geneva.

It was so decided.

The meeting rose at 4 p.m. to enable the Planning Group to meet.

Provisional

For participants only

6 June 2018
Original: English

International Law Commission

Seventieth session (first part)

Provisional summary record of the 3393rd meeting
Held at Headquarters, New York, on Wednesday, 2 May 2018, at 10 a.m.

Contents

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent as soon as possible to the Chief of the Documents Control Unit (srcorrections@un.org).

Corrected records will be reissued electronically on the Official Document System of the United Nations (http://documents.un.org/).

18-07007 (E)

Please recycle

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (*continued*) (A/CN.4/712 and A/CN.4/715)

The Chair invited the Commission to resume its consideration of the fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/715).

Mr. Murase said that it was gratifying to see that the consideration of the topic on second reading was now coming to a close; he congratulated the Special Rapporteur on that successful result. Although he generally agreed with the content of the report, he thought that the formulation of guidelines rather than conclusions would be more appropriate for the topic, in line with what had been done under the topics of reservations to treaties and provisional application of treaties.

Referring to draft conclusion 4 (Definition of subsequent agreement and subsequent practice), he pointed out that the United States had been correct to assert that the reasoning of the Tribunal of the North American Free Trade Agreement in the case concerning *Canadian Cattlemen for Fair Trade v. United States* suggested that form of acceptance was what distinguished subsequent agreement from subsequent practice. However, he did not believe that the United States established the proper distinction when it stated that subsequent agreement required a common understanding regarding the interpretation of a treaty, of which the parties were aware and which they accepted, whereas subsequent practice did not. In his view, both subsequent agreement and subsequent practice required a common understanding. The distinguishing element was probably the notion of "agreement" itself, with subsequent practice that established an agreement being distinct from the "agreement" entered into in a subsequent agreement. He concurred with the Special Rapporteur's refutation of the remark by the United States that a distinction had been drawn in paragraph (20) of the commentary to the draft conclusion between practice for purposes of interpretation and practice for purposes of application. However, the Special Rapporteur's position in that regard should be set out more clearly in the commentary.

With regard to draft conclusion 5 (Attribution of subsequent practice), he said that he shared the concerns expressed by Mr. Hassouna and Mr. Murphy about the use of the term "attributable" in paragraph 1; the introduction of concepts pertaining to the responsibility of States for internationally wrongful acts seemed inappropriate. He endorsed the amendments to paragraphs 1 and 2 proposed by the United States and rejected the amendment suggested by the Special Rapporteur in paragraph 46 of his report, in which the important element of recognition was missing.

He had been among those who had expressed concerns about "evolutionary" or "evolutive" interpretation in connection with draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time). The Commission had been able to allay those concerns, but there still seemed to be room for improvement. The Special Rapporteur drew a distinction between the actual intention and the presumed intention of the parties, but some States had expressed concerns about that distinction. He agreed with Greece that attempts to identify the presumed intention of the parties could be misleading. He also agreed with El Salvador that whether a treaty was evolving or not depended not only on the presumed intention of the parties but also on other factors. The emphasis placed in draft conclusion 8 on the "presumed intention of the parties upon the conclusion of the treaty" seemed to prioritize the original intent of the parties and thus to subordinate other factors. The result was an abstract doctrinal choice between a contemporaneous and an evolutive approach to interpretation, which was precisely what the Commission had decided to avoid. Perhaps the draft conclusion could be amended to read: "Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether the meaning of a term used in a treaty is capable of evolving over time."

In paragraph 2 of draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation), the word "it" should be replaced with "conduct", for the sake of clarity. While the word "consistency" was explained in the commentary, "breadth" was not, and it should be clarified. The Special Rapporteur seemed to consider that in order for subsequent conduct to be recognized under article 31 (3) (b) of the 1969 Vienna Convention on the Law of Treaties, the conduct of all States was not necessary. However, subsequent practice could not be established when the conduct of States was inconsistent. Draft conclusion 9, paragraph 2, should be amended to read: "The weight of subsequent practice under article 31 (3) (b) depends, in addition, on whether and how conduct is repeated and how many parties actively engage in subsequent practice."

Paragraph 1 of draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty) should be amended to read: "An agreement under

article 31, paragraph 3 (a) and (b), requires the awareness and acceptance of the parties." The second sentence of paragraph 2 was somewhat illogical: the question was not whether silence constituted acceptance of subsequent practice, but whether it could constitute subsequent practice. He therefore suggested the replacement of the word "acceptance" with "evidence".

He welcomed the proposed addition of the words "of the parties" in paragraph 2 of draft conclusion 12 [11] (Constituent instruments of international organizations), which helped to clarify the distinction between the practice of international organizations and the practice of States. However, the use of the word "practice" as opposed to "conduct" in both paragraphs 2 and 3 should be brought into line with the terminology of draft conclusions 4 and 5. Moreover, the use of those terms, and of "attribution", should be consistent with their usage in the draft conclusions on customary international law.

Unlike previous speakers on draft conclusion 13 [12] (Pronouncements of expert treaty bodies), he welcomed the inclusion of paragraph 4 and did not believe that it exceeded the scope of the topic, either in form or in substance. It was perfectly in line with the idea expressed by the Chair of the Human Rights Committee in his letter of 4 April 2017, cited in paragraph 123 of the Special Rapporteur's report, that clearer recognition should be given in the draft conclusions to the potential contribution of pronouncements of expert treaty bodies. That idea was corroborated by general comment No. 33 of the Human Rights Committee and by the substantive findings of the International Court of Justice in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. In addition, States strongly supported the work done by expert treaty bodies to interpret treaties and to ensure their application. As to form, paragraph 4 corresponded so closely to draft conclusion 12, paragraph 3, and to draft conclusion 11, paragraph 2, that if it were deleted, those two paragraphs would likewise have to be removed. As to substance, paragraph 4 did not imply that pronouncements of expert treaty bodies constituted subsequent practice. Rather, as indicated in paragraph 3, they "may give rise to, or refer to" a subsequent agreement or subsequent practice, and the Special Rapporteur elucidated that point in paragraph 131 of his report. The Chair of the Human Rights Committee had in fact recognized that the Committee's pronouncements did not directly constitute subsequent practice.

He endorsed the Special Rapporteur's proposal to submit the draft conclusions to the General Assembly in their current form.

Mr. Tladi said that if, as Mr. Murase had just suggested, the sole purpose of draft conclusion 13, paragraph 4, was to indicate that the pronouncements of expert bodies did not constitute subsequent practice, he saw no need why it was included. It seemed merely to repeat what was already stipulated in paragraph 3.

Mr. Murase said that the question should be taken up by the Drafting Committee, but in his opinion, the two paragraphs made an important point that benefited from being repeated.

Mr. Park, referring to the final form of the project as advocated by Mr. Murase, said that the Commission's practice had been evolving and now encompassed the use of guidelines, conclusions and principles, in addition to articles. He wondered whether in the Commission's 70-year history, there had been no definitions or guidance given concerning such terminology. If not, perhaps the Working Group on Methods of work should study the question.

Mr. Murphy said that he failed to see any provision in draft conclusion 11 that was comparable, as Mr. Murase suggested, to draft conclusion 13, paragraph 4.

Mr. Murase said that the Commission was a normative body; it was not engaging in a purely academic exercise. Hence, the format of its output on the current topic should conform to that used for other texts relating to the law of treaties, namely reservations to treaties and provisional application of treaties. As to Mr. Murphy's question, he said that the idea advanced in draft conclusion 13, paragraph 4, was implicit in draft conclusion 11, paragraph 2, and draft conclusion 12, paragraph 3, although admittedly they were not directly comparable.

The Chair said that the practice as to the final form of the Commission's output had evolved, as Mr. Park had pointed out, and the Commission now had a range of possibilities to choose from. It was for the Drafting Committee to deal with the points just raised; following a preliminary discussion, it should make a recommendation to the plenary, without prejudice to the holding of a broader debate, in the Working Group on Methods of work, on the question of final form in general.

Ms. Oral congratulated the Special Rapporteur for his meticulous and informative work on subsequent agreements and subsequent practice in relation to the interpretation of treaties and said that the few comments she was making were intended to facilitate the completion of work on that important topic.

Referring to paragraph 5 of draft conclusion 2 [1] (General rule and means of treaty interpretation), she said that there was an interesting discussion in paragraph 26 of the Special Rapporteur's report on whether to include a reference to the nature of the treaty. While she agreed that the nature of the treaty could be a relevant factor in its interpretation, it was also closely linked to the object and purpose of a treaty, a point made during the discussions in the Drafting Committee. She therefore agreed with the Commission's decision not to include a specific reference to the nature of the treaty.

In connection with draft conclusion 4, she said that the elements that differentiated a subsequent agreement under article 31 (3) (a) from subsequent practice under article 31 (3) (b) were not clear, as amply discussed by the Special Rapporteur in paragraphs 69 to 75 of his first report (A/CN.4/660). However, a clear explanation as to the distinction between the two means of interpretation was provided in paragraph (10) of the commentary to the draft conclusion. Under article 31 (3) (a), an agreement — whether binding or not — that reflected the common understanding of all the parties expressed in a single common act was required. While subsequent practice consisted of disparate acts or conduct of the parties, it must still express or reflect the common understanding of all the parties. She was inclined to agree with the comment of the United Kingdom and Mr. Park that the word "all" should be inserted in paragraph 2, to make clear that the agreement of all the parties was required. The word "all" should also be inserted in paragraph 1, for the sake of clarity, even though an explanation was provided in the commentary.

In his introductory statement on his report, the Special Rapporteur had recognized that draft conclusion 5 was one of the few for which substantive considerations spoke in favour of changing its formulation. She welcomed the reformulated text proposed by the Special Rapporteur for the first paragraph of the draft conclusion. However, certain States had indicated their reservations on employing the terminology of attribution from the law of State responsibility. Mr. Murphy had suggested that the text should be revised in line with the text on identification of customary international law: that proposal should be considered by the Drafting Committee. In her initial reading of both paragraphs of the draft conclusion, she had been inclined to agree with the suggestion made by some States to exclude the second paragraph. However, the commentary made quite clear the basis and justification for the paragraph and so she supported its retention.

She agreed with the Special Rapporteur overall on draft conclusion 6, including with his recommendation to remove the word "normally" and replace it with "always" in the first sentence of paragraph 1, and to adopt the proposal by Ireland to insert the words "for example" in the second sentence of that paragraph. While she saw the logic in the proposal by the United Kingdom to make paragraph 2 the new paragraph 1, she nonetheless supported the wish of the Special Rapporteur to keep the sequence of the paragraphs unchanged. She endorsed paragraph 3.

On draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), she agreed with the Special Rapporteur that it did not seek to resolve the divergence of views concerning the role of subsequent agreements and subsequent practice under article 31 in modifying or amending a treaty, but only to provide general guidance. The commentary made that point amply clear, and paragraphs 1 and 2 were likewise quite clear. However, with regard to paragraph 3, which had drawn the most comments from States, she was inclined to agree with Mr. Murphy that the reference to a presumption in favour of interpretation over modification might not be appropriate. While one option, as Mr. Murphy had suggested, was to delete paragraph 3, another option was simply to delete the first sentence, so that paragraph 3 would read: "The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties."

As currently written, draft conclusion 8 could be read as restricting an evolutive interpretation by requiring the preliminary step of determining that the parties had contemplated such an evolutive interpretation. However, as explained by the Special Rapporteur and as clearly reflected in the commentary, that did not seem to be the intent behind the draft conclusion. The examples provided were varied and included cases where it was not evident that any predetermination of the intent of the parties had been established. In paragraph (10) of the commentary, it was explained that draft conclusion 8 did not take a position regarding the question of the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general, but took a cautious approach towards determining whether the evolutive approach applied in specific cases. She therefore agreed with the wish of the Special Rapporteur to maintain the current version of the draft conclusion, but she also agreed with Mr. Murphy's proposal to delete the word "presume" before "intent".

She supported the modifications to draft conclusion 9 proposed by the Special Rapporteur, based on the proposals of States to insert the words "its consistency, breadth, and" in paragraph 2. She agreed with Mr. Tladi's explanation of the use of "breadth" and thought that such additional explanations would add clarity to the text.

She agreed in general with draft conclusion 10 and appreciated the comment by Mr. Hassouna that paragraph 1 could be drafted more clearly and the recommendation by Mr. Tladi to consider the suggestion by Ireland. Those were ideas for the Drafting Committee to consider. Mr. Murphy had raised an interesting point: that for the purposes of subsequent practice, the parties should share the same understanding, not a common one. While it was underlined in the commentary that the requirement of a common understanding of the parties meant all the parties, it was also indicated in paragraph (4) that agreement was only absent to the extent that the positions of the parties conflicted and for as long as their positions conflicted. That temporal aspect was not reflected in draft conclusion 10 and it would have added greater clarity. The Drafting Committee should consider whether such an additional qualification might be included.

On draft conclusion 11 [10] (Decisions adopted within the framework of a conference of States parties), she shared the views expressed by El Salvador and the Republic of Korea on the important role of conferences of States parties for treaty interpretation. In general, she agreed with the draft conclusion, but she also agreed that the addition of the word "consensus" could lead to confusion: she would recommend its deletion.

With regard to draft conclusion 12 [11] (Constituent instruments of international organizations), she supported the revisions made by the Special Rapporteur in response to the comments by several States on the need to make clear what was the practice of States and what was that of international organizations by inserting the words "of the parties" after "subsequent practice" throughout paragraph 2. She also agreed with the approach outlined by the Special Rapporteur in paragraph 117 of his report on how to distinguish between the subsequent practice and agreements of States, on the one hand, and the subsequent practice of an international organization, on the other, namely by following the proposal of the Republic of Korea to add explanations in the commentary.

In conclusion, she thanked the Special Rapporteur for his report and believed that the Commission should bring it to the attention of the General Assembly.

Mr. Grossman Guiloff thanked the Special Rapporteur for his careful and extensive preparation of the draft conclusions and for his thoughtful responses to the concerns and questions raised in the Sixth Committee and by members of the Commission. He generally supported the Special Rapporteur's vision for the final form of the draft conclusions and hoped that the General Assembly would take note of them and the relevant commentary in a resolution.

On the whole, the draft conclusions reflected the significance of subsequent practice and subsequent agreements by States parties in interpreting treaties, as well as the increasing role that non-State actors played in the development of subsequent practice and subsequent agreements or the realization of the object and purpose of treaties on the interpretation of treaties. He supported the inclusion of draft conclusions relating to subsequent practice and subsequent agreements of international organizations, decisions made within the framework of conferences of States parties, and pronouncements by expert treaty bodies. He also believed that whether the decisions of adjudicatory bodies, including domestic courts, should be addressed in a draft conclusion should be further discussed.

He endorsed draft conclusion 1 [1a] (Introduction) and agreed with the Special Rapporteur that it should not be overly complicated. He agreed with the substance of draft conclusion 2, which promoted consistency with article 31 of the 1969 Vienna Convention. However, he believed the structure of the draft conclusion could be improved by moving paragraph 5 up so that it became the new paragraph 2. As the United Kingdom had noted, the substance of paragraph 5, namely that the interpretation of a treaty consisted of a single combined operation, was crucially important to the exercise of treaty interpretation. Therefore, placing the paragraph earlier in the draft conclusion would better reflect the nature of treaty interpretation. He also agreed with the United Kingdom that the commentary to the draft conclusion should be revised to more clearly reflect the fact that the rules on interpretation applied, as a matter of customary international law, to treaties which predated the Vienna Convention. No changes should be made to draft conclusion 3, except for replacing, in the Spanish version, the words "*en el sentido*" with "*en virtud del*".

Although the substance of draft conclusion 4 was fully acceptable, paragraph 1 might be further clarified. As Austria and the United Kingdom had pointed out, a subsequent agreement did not need to be legally binding to be useful in interpreting a treaty. That point was made in the second sentence of draft conclusion 10, paragraph 1, but placing it earlier in the whole text

would help to clarify what could be considered a subsequent agreement. Perhaps, then, the relevant part of draft conclusion 10 should be included in paragraph 1 of draft conclusion 4. The Special Rapporteur had expressed concern that that would overburden draft conclusion 4, but that provision was critical to understanding the scope of the definition of subsequent agreements and should be placed earlier in the draft conclusions.

On draft conclusion 5, which he generally supported, he shared with the United States the concern that, paragraph 1, as currently written, might be misleading. Its clarity could be improved by indicating that State practice represented a course of conduct rather than a solitary action. The point was fairly complex, but it could be explained in the commentary. It could also be made clear that actions taken in interpretation of a treaty by lower-ranking officials, when attributable to the State, could only amount to subsequent practice if they were consistent and acknowledged and endorsed by the State. He agreed with the Special Rapporteur that paragraph 2 was generally clear. It reflected the fact that practice by non-State actors normally did not directly impact on the interpretation of treaties. However, it also reflected the fact that non-State actors played an increasing role in international affairs, and that actions taken by States towards non-State actors in the application of treaties constituted State practice and contributed to the interpretation of treaties. Additionally, in response to the comment by Germany regarding non-State actors acting on behalf of a State in implementing a treaty, he agreed that such conduct could constitute subsequent practice if the non-State actors were acting as agents of the State.

On draft conclusion 6, he agreed with the revisions suggested by the Special Rapporteur and Ireland to paragraph 1. They allowed for the necessary flexibility in identifying subsequent State practice and subsequent agreements by signalling that the sort of situation mentioned was just one exception and made the paragraph more consistent with paragraph 2, which reiterated that subsequent agreements and subsequent practice could take a variety of forms.

He agreed with the Special Rapporteur that paragraph 1 of draft conclusion 7 was clear and appropriate and that the approach of the Commission had been generally accepted. While the Special Rapporteur recommended leaving the draft conclusion as it was, he himself saw a need to discuss whether paragraphs 2 and 3 should be revised to promote consistency with the 1969 Vienna Convention and with current State practice and *opinio juris* concerning the interpretation of treaties. He agreed with Spain that the word "clarification" in paragraph 2 should be replaced with "confirmation", because article 32 of the Vienna Convention used the word "confirmation" when describing the function of subsequent practice. He also agreed with the proposal by the United Kingdom to add the words "by confirming the interpretation that has been reached under conclusion 7 (1)" at the end of the paragraph. That addition more accurately reflected the relationship between interpretation of a treaty under article 31 and confirmation of such interpretation under article 32. Moreover, it was consistent with the proposed revisions to draft conclusion 9, paragraph 3.

There was also a need to consider whether draft conclusion 7, paragraph 3, should be revised. The first and second sentences, which discussed the amendment and modification of treaties, should be deleted, in line with the comments made by Romania and Italy. The change would have the text more accurately address the divergence of views within the Commission, the Sixth Committee and the larger international community regarding what role, if any, subsequent practice and subsequent agreements played in the amendment and modification of treaties. As Austria had noted, consistent State practice in interpreting a treaty, if accompanied by *opinio juris*, could become customary law. Subsequent practice of that magnitude would undoubtedly be relevant to the interpretation of the treaty and could also lead to the amendment or modification of the treaty, depending on the terms of the treaty. Furthermore, as noted by the Netherlands, the extent to which subsequent practice and subsequent agreements could amend or modify a treaty depended on the treaty itself. Finally, as suggested by the Special Rapporteur, the last sentence in paragraph 3 should be moved to form a separate paragraph. That would further separate the issue dealt with in the draft conclusions from the evolving issue, which was not the subject of the draft conclusions, of subsequent practice and subsequent agreements in relation to the amendment and modification of treaties.

He agreed with the Special Rapporteur on the substance of draft conclusion 8. The words "may assist" provided the necessary flexibility for evaluating whether subsequent practice and subsequent agreements were relevant to the interpretation of a term in a treaty. However, he also agreed with the United States that the inclusion of the words "presumed intention" could be misleading. The reference to intention could be removed, to preclude reading the draft conclusion as authorizing an investigation into the intent or presumed intent of the parties upon conclusion of the treaty. While the Special Rapporteur had noted that the provision was clarified in the commentary, it would be clearer yet if

any reference to intention was left out of the draft conclusion.

While endorsing the content of draft conclusion 9, he suggested that the criteria for evaluating the weight given to subsequent practice and subsequent agreements when interpreting treaties, as listed in paragraph 1, could be elaborated further. As the United Kingdom and El Salvador had suggested, such criteria should be expanded to include consistency, breadth, timing and the emphasis of the parties. While he agreed with the Special Rapporteur that the criteria suggested by El Salvador, namely timing and emphasis of the parties, might not always be applicable to determining the relevance of subsequent practice or subsequent agreements in treaty interpretation and might be difficult to measure, he believed the problem could be addressed by adding the words "when relevant" to paragraph 1. Paragraph 3 could be revised to be more consistent with the Vienna Convention by replacing the words "supplementary means of interpretation" with "confirmation of the interpretation under article 31," and moving that phrase to appear after the words "under article 32". That revision would more clearly reflect the relationship between articles 31 and 32 of the Vienna Convention.

On draft conclusion 10, the substance of which he endorsed, he suggested that consideration should be given to revising paragraph 1. He supported the distinction drawn by the Special Rapporteur between subsequent agreement and subsequent practice. As acknowledged in paragraph 1, a subsequent agreement required a common understanding regarding the interpretation of a treaty which the parties were aware of and accepted. In contrast, acceptance of subsequent practice establishing an agreement on interpretation could be inferred from silence when, as indicated in paragraph 2, "the circumstances call for some reaction." Contrary to what the Czech Republic had said, the draft conclusion made it clear that silence could only be seen as acceptance if some reaction in opposition would be warranted. Accordingly, if a party did not participate in a practice when presented with the opportunity to do so, such conduct would signify disagreement by action, rather than agreement by silence. He advocated moving the last sentence of paragraph 1, dealing with the relevance of legally binding versus non-legally binding agreements on treaty interpretation, to draft conclusion 4.

He agreed with the Special Rapporteur that no changes to the current text of draft conclusion 11 were necessary. Speakers in the Sixth Committee had supported the recognition in the draft conclusion of the relevance of decisions made within the framework of a conference of States parties to the interpretation of treaties. As noted by the Netherlands and the United States, the relevance of such decisions varied, depending on the terms of the treaty in question. Additionally, when a decision was reached as to the interpretation of a treaty, it could be considered subsequent practice or subsequent agreement under article 31, and its probative value in interpreting the treaty could be significant. As currently written, the draft conclusion conveyed the potential significance to the interpretation of a treaty of a decision made within the framework of a conference of State parties as well as the importance of evaluating the significance of such decisions against the terms of the specific treaty.

Concerning draft conclusion 12, some States had voiced concern that it did not sufficiently distinguish between the subsequent practice and subsequent agreements of States and those of international organizations in treaty interpretation. He agreed that the distinction was important and supported the Special Rapporteur's suggested revisions to paragraph 2, apparently based on comments by Romania and Spain. On the other hand, he disagreed with the suggestion by some States that a reference to treaty modification or amendment should be included. Such a reference would be inappropriate, because such matters fell outside the scope of the draft conclusions.

He recalled that the subject matter of draft conclusion 13, namely pronouncements of expert treaty bodies, had been debated extensively not only at the International Court of Justice, but also within the Commission and other authoritative bodies. For instance, the Court had indicated, in the *Diallo* case, that it (the Court) should "ascribe great weight to the interpretation adopted by this independent body" (the Human Rights Committee) "that was established specifically to supervise the application of that treaty", namely the International Covenant on Civil and Political Rights. No valid argument had been presented so far to narrow the scope of that decision and its value for the Special Rapporteur's task.

Extensive materials drawn from the work of treaty bodies, such as their views, general comments and concluding observations, were also often cited by States, as evidenced, for example, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* before the International Court of Justice. In its memorial, Belgium had argued that the object and purpose of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were clearly established in its preamble: the Convention had been adopted to "make more effective the struggle against torture and other

cruel, inhuman or degrading treatment or punishment." Senegal, in its counter-memorial in reaction to its obligations under article 22 of the Convention, had stated that it was bound "on the one hand to act on the recommendations of the Committee against Torture and, on the other, to execute the mandate that it had received from the African Union" to bring to trial the former President of Chad, Mr. Hissène Habré. The Assembly of African Heads of State and Government, at its seventeenth session held in July 2011, had urged Senegal to carry out its legal responsibility in accordance with the Convention against Torture and the decision of the Committee and to put Mr. Hissène Habré on trial expeditiously or extradite him to any other country willing to put him on trial.

In a letter of 4 April 2017 addressed to the then-Chair of the Commission, the Chair of the Human Rights Committee had pointed out that the national courts of States parties quoted pronouncements of the Committee in their judgments. In its comments contained in document A/CN.4/712, Sweden, on behalf of the Nordic countries, had stated that expert treaty bodies contributed to the understanding, implementation and development of international human rights law through their pronouncements, general comments, decisions and recommendations.

Treaty bodies were established by States to realize the object and purpose of their constituent instrument. States were free to accept the different forms of supervision under those treaties, including the right of individuals to present petitions claiming that a violation had occurred. In his opinion, the proposal by the Special Rapporteur was modest, since it used the verb "may," yet it embodied important practice and principles with legal relevance. That flexibility was needed in an area whose significance for States and individuals could not be overstated, in order to capture the complexity of the current state of play, where State practice accorded legal value to some of the outputs of treaty bodies and some States considered that they had an agency relationship with treaty bodies, while others distinguished between the procedural aspects and the substantive decisions of those bodies and set up monitoring mechanisms in which they themselves, as a group, served as collective guarantor of compliance.

In general, States created treaty bodies as a means of channelling, through legal structures, their aspirations and demands relating to, for example, due process, non-discrimination and the rights of children and women; and of giving relevance to the rule of law rather than to encouraging extralegal action and extremism. That was the political context in which the Commission was called upon to work, and it must tread very carefully. The flexibility shown by the Special Rapporteur was therefore commendable.

In conclusion, he said that he supported the ultimate aim of the draft conclusions.

Mr. Rajput wished to know what, for the purposes of subsequent practice, would be an appropriate distinction between a fact-based analysis of the pronouncement of treaty bodies particular to a certain case and a general observation on State practice.

Mr. Tladi said that he had resisted the inclusion of a reference to the pronouncements of treaty bodies because he was not convinced that they constituted subsequent practice in treaty interpretation. They were certainly valuable and had legal effect. But the real question was whether they were valuable because they elucidated something about the object and purpose of a treaty or because they came from an authoritative body that had interpreted the treaty.

Mr. Grossman Guiloff said he was aware that at issue was not the intrinsic value of pronouncements of treaty bodies, but their relevance to subsequent agreements and subsequent practice in relation to treaty interpretation. When States created a treaty monitoring body on compliance with a clause on non-refoulement, for example, they did not clarify the conditions to be fulfilled regarding such compliance. Subsequently, a treaty body might make a finding about the conditions under which the principle of non-refoulement might be applicable, or not applicable. That finding might be reinforced by other treaty bodies and might ultimately influence State practice. Hundreds of such interpretations had been issued over the years by the treaty bodies, arising both from individual cases and from general observations. As to how pronouncements on specific cases compared with general comments, he pointed out that, in the *Belgium v. Senegal* case, it was a general comment of a treaty body that had been cited. In pronouncements on individual cases, specific norms would be applied, and the cumulative effect of their application might give rise to a rule or to an interpretation of a clause in a convention.

Mr. Hmoud said that the nature of pronouncements of treaty bodies had already been discussed extensively and the Commission's position was clearly laid down in paragraph 3 of draft conclusion 13. As Mr. Tladi had pointed out, the issue was not the value of such pronouncements, but whether they truly constituted subsequent practice in relation to the interpretation of treaties. The Commission had already decided that they did not.

The meeting was suspended at 11.35 a.m. and resumed at 12 noon.

Mr. Saboia said that he wished to congratulate the Special Rapporteur for his excellent report, which helped to increase understanding and shed light on the operation of important provisions of the 1969 Vienna Convention, thus adding a new chapter to the already substantial body of work on the law of treaties developed by the Commission over its 70 years of existence.

The 13 draft conclusions and commentaries thereto that the Commission had adopted on first reading at its sixty-eighth session had been well received by States, judging both by their comments expressed in the Sixth Committee and those submitted in writing in accordance with established practice.

As the Commission neared the conclusion of its work on subsequent agreements and subsequent practice in relation to the interpretation of treaties, it was worth looking back at the history of the topic and briefly revisiting the broad perspective from which it had been approached during the debate concerning its inclusion in the Commission's programme of work. The topic had originally been entitled "Treaties over time" and entrusted to a Study Group ably chaired by Mr. Nolte. The rules on subsequent agreements and subsequent practice, as contained in article 31 (3) (a) and (b) of the 1969 Vienna Convention, had been considered not only as part of the general rule of treaty interpretation but also as among the intertemporal elements that affected treaty law, including the question of whether treaties must be subject to contemporaneous or evolutive interpretation.

The Study Group on Treaties over time had worked from 2008 to 2012 and had examined a large number of materials and case law on the issue of subsequent agreements and subsequent practice, as presented in the three reports of its Chair. Although aware from the start of the need to avoid an overly broad approach to the subject of the effects of time on treaty interpretation, the Study Group had found that the complexity of the issue called for narrowing the scope of the topic. The change in its title from "Treaties over time" to its current title, particularly through the addition of the words "in relation to the interpretation of treaties", reflected a decision to adopt a more focused approach, while the appointment of Mr. Nolte as Special Rapporteur for the topic ensured continuity with the work already completed by the Study Group.

In the introduction to his first report on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/660), the Special Rapporteur had included a quotation from the original proposal for the topic that nevertheless remained relevant in the current context:

> As important treaties reach a certain age, in particular law-making treaties of the post-1945 era, the context in which they operate becomes different from the one in which they were conceived. As a result, it becomes more likely that some of these treaties' provisions will be subject to efforts of reinterpretation, and possibly even of informal modification. This may concern technical rules as well as more general substantive rules. As their context evolves, treaties face the danger of either being "frozen" into a state in which they are less capable of fulfilling their object and purpose, or of losing their foundation in the agreement of the parties. The parties to a treaty normally wish to preserve their agreement, albeit in a manner which conforms to present-day exigencies. Subsequent agreement and subsequent practice aim at finding a flexible approach to treaty application and interpretation, one that is at the same time rational and predictable.

That was the perspective from which the topic had originally been perceived, and one that remained valid, even though its scope had had to be narrowed and its visionary tone subdued. As on previous occasions when the Commission had attempted to deal with a temporal issue, the complexity surrounding it appeared too difficult to overcome, both for States and for the Commission. Accordingly, as explained in paragraph (2) of the commentary to draft conclusion 1: "The draft conclusions do not address all conceivable circumstances in which subsequent agreements and subsequent practice may play a role in the interpretation of treaties." Among examples of circumstances not covered by the topic were treaties between States and international organizations, treaties between international organizations and rules adopted by an international organization. Thus, even as the Commission was concluding its efforts on the topic, it appeared that additional work remained to be done in relation to that aspect of the law of treaties.

Concerning the text of the draft conclusions, he had no issue with draft conclusions 1 to 4. With regard to draft conclusion 5, he considered acceptable the Special Rapporteur's recommendation, set out in paragraph 46 of his report, that paragraph 1 should be reformulated to make it clearer that not every conduct that could be attributed to a State under the rules of State responsibility was sufficient to count as subsequent practice for the purpose of treaty interpretation. He was

also open to the suggestions for improving the text that had been made by Mr. Murphy and Mr. Murase.

With reference to paragraph 3 of draft conclusion 7, he appreciated the Special Rapporteur's concise and substantive description in his report of the divergent views on the general question of whether the subsequent practice of the parties could lead to the modification of a treaty. He shared the Special Rapporteur's opinion that the wording of paragraph 3 reflected the widest possible agreement among States and members of the Commission and should be retained.

With regard to draft conclusion 9, he considered the Special Rapporteur's proposal for the reformulation of paragraph 2, as set out in paragraph 84 of his report, to be a good improvement to the text.

As to draft conclusion 10, responding to a contrary view expressed by the United States of America concerning the first sentence of paragraph 1, the Special Rapporteur had rightly pointed out in paragraph 87 of his report that the *travaux préparatoires* relating to article 31 (3) (a) and (b) of the 1969 Vienna Convention showed that awareness and acceptance of the parties were considered necessary for the interpretation of a treaty.

With regard to draft conclusion 11, the United Kingdom and Ireland had made a proposal to move to the commentary the reference to consensus contained in paragraph 3. He agreed with the Special Rapporteur's response to that proposal in paragraph 102 of his report that the concern expressed by those States did not justify shifting the most important category in practice from the text of the draft conclusion to the commentary. He himself preferred to keep paragraph 3 as it stood; however, as an alternative, he would not be opposed to enclosing in brackets the words "including by consensus", as proposed by the Special Rapporteur in that same paragraph.

With regard to draft conclusion 12, several States had expressed concern that an insufficient distinction had been drawn between, on the one hand, the subsequent agreements and subsequent practice of States parties, addressed in paragraph 2, and, on the other, the subsequent agreements and subsequent practice of international organizations as such, addressed in paragraph 3. He considered their concern to be unfounded in that it was based on an approach aimed at minimizing the legal status of international organizations, which, as the International Court of Justice had pointed out in its advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, were "endowed with a certain autonomy". The text adopted on first reading seemed perfectly acceptable to him. Nevertheless, he could endorse the Special Rapporteur's proposal in paragraph 119 of his report that the words "of the parties" should be inserted after the words "subsequent practice" in the two instances in which they appeared in paragraph 2. He furthermore endorsed the Special Rapporteur's argument in paragraph 111 of his report against the deletion from paragraph 3 of the reference to article 31 (1) of the 1969 Vienna Convention.

The formulation of draft conclusion 13 was a good illustration of the balance that could be struck on a subject that had elicited a wide divergence of views. At the same time, he would have preferred for it to describe more fully the role currently played by expert bodies. It was regrettable that the narrow scope of the provision did not cover those expert bodies that were organs of an organization, irrespective of their level of independence. The Special Rapporteur had carefully analysed the comments of States, had retained most of what the Commission had adopted on first reading and had made two significant recommendations, both of which he fully endorsed. The first was aimed at providing more clarity to the part of the provision that dealt with the effects of silence. The second was a proposal to return to an earlier formulation contained in his fourth report (A/CN.4/694) and to add the new paragraph set out in paragraph 139 of his report. He fully concurred with that proposal and supported the comments of Mr. Murase and Mr. Grossman Guiloff along those lines. The addition of that new paragraph at the end of the project would constitute a significant improvement to the entire set of draft conclusions.

Mr. Nguyen said that the report of the Special Rapporteur was excellent and constituted a comprehensive and thoughtful piece of work which logically reaffirmed the final set of proposed draft conclusions. Although he agreed with most of the draft conclusions and commentaries, there were a few specific points he wished to raise in an effort to improve the text.

In paragraph 1 of draft conclusion 2, it would be useful to insert the words "of 1969" after the words "the Vienna Convention on the Law of Treaties", in order to avoid any confusion with the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

In paragraph 2 of draft conclusion 5, the inclusion of the words "Other conduct, including by non-State actors" seemed to emphasize the conduct of such actors and could lead readers to believe that it was one of the main categories of conduct that did not constitute subsequent practice under articles 31 and 32. Such

conduct could nevertheless be relevant when assessing the subsequent practice of parties to a treaty, and there were possibly other forms of conduct by actors other than non-State actors that were covered by the terms of that paragraph. Logically, that would mean that some forms of conduct by non-State actors were covered under paragraph 2, thus making it overlap with the scope of paragraph 1. To ensure consistency with paragraph 3 of draft conclusion 4 and with paragraph 3 of draft conclusion 6, the phrase "one or more" should be inserted before the word "parties" in paragraph 2 of draft conclusion 5. For the sake of clarity, he proposed that paragraph 2 should be amended to read: "Conduct other than that covered by paragraph 1 does not constitute subsequent practice under articles 31 and 32. Said conduct may, however, be relevant when assessing the subsequent practice of one or more parties to a treaty."

Draft conclusion 6 was clear. A written agreement, an informal agreement or a non-binding arrangement arrived at subsequent to the conclusion of a treaty could have the value of a subsequent agreement in the interpretation of the treaty. There was no hierarchy among the various forms of subsequent agreement and subsequent practice in the interpretation of treaties. That observation was consistent with paragraph 1 of draft conclusion 9. However, with regard to the Special Rapporteur's suggestion in paragraph 60 of his report to replace the word "normally" in the second sentence of paragraph 1 with the word "always", he shared the concern that had been raised by Mr. Park and Mr. Murphy.

With regard to draft conclusion 7, the words "can also" in paragraph 2 failed to convey adequately the secondary role and indirect possible effect of subsequent practice under article 32 of the 1969 Vienna Convention relative to that of subsequent agreements and subsequent practice under article 31 (b) of the Convention to which reference was made in paragraph 1. In paragraph 2, he proposed that the word "can" should be deleted and that the word "also" should be moved and inserted after the word "contribute".

Noting the concern raised by Spain with regard to the use of the word "clarification" in paragraphs 1 and 2 and the fact that article 32 of the 1969 Vienna Convention used the verbs "confirm" and "determine" but not "clarify", he proposed that the word "identification" should be used in place of the word "clarification" in both paragraphs. In paragraph 3, replacing the phrase "[i]t is presumed that" with the phrase "[f]or the purpose of the present draft conclusion" would help to avoid confusion.

With regard to draft conclusion 10, he agreed with the Special Rapporteur that the formulation of paragraph 2 was firmly rooted in the long-established terminology of the Commission and of the International Court of Justice. However, in the context of subsequent practice in relation to the interpretation of treaties the International Court of Justice and other judicial bodies did not use the word "silence" in all their decisions, with expressions such as "omission", "acquiescence", "tacit acceptance", "tacit consent" and "tacit agreement" being used to refer to the same concept. However, "tacit consent" and other similar expressions could imply that, the party concerned had been aware of and had accepted the subsequent practice of the other party. It could also be understood without being openly expressed. Since not all types of silence could be explained as acceptance of a common understanding regarding subsequent practice, a more comprehensive approach would be to include the concepts of both silence and intended omission.

In addition, the word "silence" had a different meaning in draft conclusion 10 than it did in draft conclusion 13. In paragraph 2 of draft conclusion 10, silence on the part of one or more parties could be presumed to constitute tacit acceptance of the subsequent practice as an authentic means of interpretation under article 31 (3) (a) when the circumstances called for some reaction, whereas paragraph 3 of draft conclusion 13 concerned the silence of a party in the case of a pronouncement of an expert treaty body in the interpretation of a treaty, which was a supplementary means of interpretation and did not require a response. The reason for choosing the word "silence" in various situations should therefore be further clarified in the commentary.

In draft conclusion 13, it should be explicitly indicated in paragraph 4 that the pronouncement of an expert treaty body was not legally binding. Such a pronouncement could not modify or amend the provisions of a treaty, and, as mentioned previously, States had no obligation to provide a response to it.

In conclusion, he wished to pay tribute to the Special Rapporteur, whose expertise, guidance and cooperation had greatly facilitated the Commission's work on the topic. Completion of the second reading of the set of draft conclusions would make a major contribution to the elucidation of the 1969 Vienna Convention on the Law of Treaties and to treaty law in general. It would highlight the important role of subsequent agreements and subsequent practice in the contemporaneous and evolutive approaches to the interpretation and application of treaties and reflect the progressive development of the rules for the

interpretation of international treaties on the basis of article 31 (3) (a) and (b) and article 32 of the Convention. He was therefore in favour of referring the draft conclusions to the Drafting Committee and endorsed the Special Rapporteur's proposal to recommend to the General Assembly that it should take note of the draft conclusions in a resolution.

The meeting rose at 12.40 p.m. to enable the Drafting Committee on Peremptory norms of general international law (jus cogens) to meet.